European Association for Family and Succession Law

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News about Family Law in Europe: from suitcases to the laws

A. CASES

1. Decision of German Supreme Court on the right to adoption of not married lifepartners and partners not bound by a civil partnership (decision of February 8, 2017 – Az. XII ZB 586/15)

by RAin Avv. Dr. Valerie Moro

On February 8, 2017, the German Supreme Court (Bundesgerichtshof), established that adoption of a one partner's child, is not possible, by the other life partner or the partner not bound by a civil partnership. According to the German Supreme Court, this decision does not, in any way, violate article 8 of the European Convention on Human Rights.

The XII senate of the German Supreme Court on February 2017 decided that adoption of minors by persons who are not married and are not bound by a union is not possible, as the German legal situation is clear and as through this [decision] the protection of the family, guaranteed by the Constitution, is not violated.

The decision was based on the following facts: the partner of the mother of two minors, whose father died in 2006, wanted to adopt the abovementioned children in order to let the minors become mutual children of the couple.

The Supreme Court confirmed the dismissive decisions in the foregoing instances with the argument according to which, contrary to the stepchild adoption through spouses or life partners, there was no comparable legal regulation for not married persons. For this reason, a not married person who is also not bound by a civil union could adopt a child under § 1741, para 2, period 1 of the German civil code – BGB only alone and this would have lead, in the present case, that the relationship of the child to the own mother would have ceased, according to § 1755, para 1, period 1 of the German civil code – BGB.

The German Supreme Court does not hold the legal regulation in force to be contrary to the German Constitution. The mothers' life partner could not refer to the parental rights foreseen in in art. 6, para 2, period 1 of the German Constitution, as he is merely the social, but not the legal or the natural parent. The fundamental right to a family according to art. 6, para 1 of the

German Constitution should not be violated, because this does not include a right of family members to adoption. Also, the general principle of equality at art. 3, para 1 of the German Constitution is not violated following the opinion of the highest court, as the legislator should be able to treat the comparable situations (not married life partners on one side and spouses and partners on the other) differently. The aim hereby sought, i.e. to guarantee a stable relationship between the parent and the children to be adopted, should be legitimate. If the legislator, for that purpose, significantly aims to a legally secured union in form of a marriage or a civil union, this should lie within his legislative discretion.

The regulations on adoption, here subject of the controversy, also do not violate the claimants in their right of the respect to family life, in art. 8 of the European Convention on Human Rights. Indeed, the European Convention on the Adoption of Children, amended in 2008, allows the adoption of a child, among others, by two persons of different gender, to be permitted, if they "live in a stable relationship". However, this is only a saving clause, but not an already (binding) value choice. Likewise, the European Court for Human Rights does not pretend to allow to not married life partners to gain status of common parents of minors through adoption. Instead, in principle, the Court recognized the termination of the relationship of the child to its biological parents in case of adoption of minors. The Court established a violation of art. 8 of the European Convention on Human Rights only for the exceptional case of the adoption of an adult, but disabled, child through the mother's life partner with termination of the relationships with the mother. In contrast with this situation, the children in the case to decide were minors and for minors the German legislator keeps basing a stepchild adoption on a particularly consolidated relationship of the adopting persons in form of a marriage or a civil union to preserve the interest of the child's wellbeing.

2. In case of public interest, the removal of a minor from the partners does not violate article 8 of the European Convention on Human Rights (decision of the European Supreme Court, Paradiso and Campanelli v. Italy, January 24, 2017, ric. no. 25358/12)

The removal of a minor from the partners, who adopted him, doesn't establish a violation of art. 8 of the European Convention on Human Rights. In particular, this occurs in case the minor is removed because of public interest, like the interest of the child to be protected from illegal trafficking.

(The decision and the comment can be read in Italian at http://www.rivistafamilia.it/2017/02/07/fronte-prevalenti-interessi-pubblici-lallontanamento-del-minore-non-viola-lart-8-cedu/)

3. Application of art. 724, para 2 of the Italian Civil Code in case of withdrawal of funds from a German shared bank account (OLG Munich April 4, 2016, 20 U 3830/15)

by RAin Avv. Dr. Valerie Moro

In case of a shared bank account, if the deceased's spouse withdraw funds from it, the funds have to be put back into that account, according to art. 724, para 2 of the Italian Civil Code, for the purpose of sharing-out of the estate.

The decision of the OLG Munich (Court of Appeal) was based on the following facts. The deceased, who was exclusively Italian citizen, died in 2012, thus before the European Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession no. 650/2012 (hereinafter, "**Regulation 650/2012**") came into force. According to art. 25, para 1 of the introduction law of the German civil code (EGBGB - old version), the succession to the estates of deceased person was subject to the law of the State to which the deceased belonged at the moment of death, i.e., in this case, the Italian law.

The deceased had two children with his wife, moreover another child from an extramarital affair. Wife and children are statutory heirs, the inheritance has to be partitioned.

The deceased had, together with his wife, a shared account at a German bank. The wife withdrew, shortly before the death of her husband, a sum amounting to Euro 95.420,00; before this withdrawal, the account balance was Euro 134.969,00.

The claimant, the son generated from the extramarital affair, asks – among other things – for a declaration that the sum, withdrawn by the wife from the shared account, constitutes a sum that has to be compensated due to donation or deducted on grounds of a debt towards the deceased, according to art. 724 of the Italian civil code.

The OLG Munich (Court of appeal) negated the wife's duty to adjust advancements towards the community of heirs, as the claimant did not succeed to prove a donation during the proceeding.

With regard to the deduction, the OLG Munich however decided in favor of the claimant: claims arising from the position as holder of a shared account are subject, according to art. 4, para 2, Rome I Convention, to German law. It was then established, that the deceased has a right to repayment of half of the sum that the wife withdrew from the shared account, according to § 430 of the German civil code (BGB). In fact, in case of shared account it is presumed, unless a different regulation is proven, that the holders of the account are joint creditors towards the bank (§ 428 of the German civil code – BGB) and, thus, a shared (1/2) participation in the account balances exists (see, *BGH NJW 1990, 705; OLG Köln, WM 2000, 2485, 2487*)

Because of the provision of art. 724, para 2, of the Italian civil code, the deduction of the debt takes precedence on the claim of payment to the communities of heirs. The judges decided that

the circumstance, that the request of the estate towards the wife could not be entirely fulfilled through the deduction, did not change anything with regard to the preferential adjustment of advancements according to the Italian provision.

4. Domestic abuse and timing of protection: the case Talpis v. Italy (European Court of Human Right, March 2, 2017, n. 4123/2014)

In this decision, the European Court of Human Right ordered Italy to pay € 30.000 for non - material damages, because the Italian authority didn't act in time after the woman filed a complaint for having suffered domestic abuse from her husband. The domestic abuse has been the reason for the son's murder.

(The decision and the comment can be read in Italian at http://www.rivistafamilia.it/2017/03/27/violenza-domestica-tempestivita-della-tutela-caso-talpis-c-italia/)

5. The interest in the education and the social integration of the child override the parent's religious liberty (European Court on Human Right, Affaire Osmanoglue e Kocabaş v. Suisse, January 10, 2017, ric. No. 29086/12)

The European judge established that the interest of a children in a complete education, for the purpose of the integration of them in the society, override the parent's desire to exclude them from attending certain courses because of their religious faith.

(The comment can be read in Italian at http://www.rivistafamilia.it/2017/02/23/linteresse-alleducazione-alla-piena-integrazione-sociale-del-minore-prevale-sulla-liberta-religiosa-dei-genitori/)

6. Discouraging the abortion and the main principles in the German Law. About a recent decision of Verwaltungsgerichtshof of Munich (May 12, 2016, M 22 K 15.4369)

It is illegal the total prohibition of sidewalk counseling towards pregnant women in front of a clinic specialized in abortion.
In this specific case, the Bavarian judge declared invalid an act adopted by the City of Munich, that prohibited a catholic association to organize sidewalk counseling in front of a clinic in which doctors performed abortions. The decision considers sidewalk counseling granted in the German Grundgesetz, that protects right to life, religious freedom, freedom of speech.

(The comment can be read at http://www.rivistafamilia.it/2017/04/20/dissuasione-dallaborto-diritti-fondamentali-nellordinamento-tedesco-proposito-recente-sentenza-del-verwaltungsgerichtshof-monaco-baviera/)

B. LAW

1. The introduction of a new law about civil union in the International Private Law (D. Lgs. January 19, 2017 n. 7)

In Italy, a new D. Lgs. January 19, 2017, n. 7, entered in force on February 2017. This law introduced, in the International Private Law (L. n. 218/1995), the articles n. 32 *bis* and 32 *quinquies* about the regulation of the civil unions and reformed the article n. 45 about the maintenance obligation.

(The decision and the comment can be read in Italian at http://www.rivistafamilia.it/2017/02/20/la-regolazione-delle-unioni-civili-nelle-norme-diritto-internazionale-privato/)

2. 40 years of the Reform of Family Law

by RAin Avv. Dr. Valerie Moro

The main aspects of the Reform of Family Law in Germany.

On July 1, 2017, the German Family Law Reform celebrates its 40. anniversary. On that day, the "First Law on the Marriage and the Family Law Reform" came into force.

The reform brought the change of the law on the married name, i.e. the possibility, that the spouses could choose either the surname of the woman or the one of the man as family name; since then, the spouse, whose name does not become the family name, can prepend his birth name to the family name.

In the marriage laws, the so-called housewives' marriage (*Hausfrauenehe*) enacted by law, has been abolished. Until the reform took place, the woman was obliged to take care of the household from the marriage on and could be employed only if she did not neglect her family duties. The "key power„ (*Schlüsselgewalt*) has consequently also been amended. Up to 1977, the woman had merely the right „*to execute the man's business and to represent him within the domestic sphere of activity*" and the business transaction that she executed within this sphere of activity would be considered as undertaken by the man (§ 1357, para. 1 old version of the BGB – German civil code). The actual norm provides that both spouses can undertake transactions in order to cover the family needs, with effects for both of them.

The law on divorce experienced a substantial reform through the abolition of the divorce for fault and the introduction of the principle of disruption (*Zerrüttungsprinzip*). Thus, on one hand, every marriage could be divorced after three years of separate living and the disruption, that became evident, also if one party would oppose to the divorce; on the other hand, the

negative effects of the decision on the fault, for example, the loss of the entitlement to maintenance, were abolished. Instead, the legislator of the reform introduced several entitlements to maintenance, based on solidarity after the marriage, for example for childcare and illness. In general, the former spouse who was in need, was entitled to maintenance. The right to maintenance has been reformed countless times in the following decades, until the principle of the self-responsibility in force nowadays (§ 1569 BGB – German civil code).

If before the reform, ordinarily the parent, who was "innocent" as to the divorce, would get the custody of the children, now the welfare of the child became the determining criteria for the decision, on who had to be the legal guardian after the separation. The shared custody, that arises with the child's birth and remains regularly after the separation, has been subject of the law on the Reform on the Parentage Law of December 16, 1997, that came into force on July 1, 1998. It has to be noted that the automatism applies only to married parents. The father, who is not married to the mother, does not get the parental rights, not even through the recognition of fatherhood; he has rather to deliver a custody declaration that needs the mother's involvement, according to § 1626a, para 1, no. 1 BGB – German civil code). If the mother refuses, only the motion to the Family court remains.

Whereas the community of accrued gains (*Zugewinngemeinschaft*, - that is not, however, a community of property, instead a separation of property with entitlement to compensation in case of termination of marriage; in case of divorce this one is calculated, in case of death it is a lump-sum compensation) has been introduced already with the law on equality of rights of 1957 – thus abolishing the administration and the usage of the marriage property through the sole husband – the legislator of the reform of 1977 now also foresaw the pension adjustment (*Versorgungsausgleich*) between the spouses. In this regard, it is a partition between the spouses of the pension rights acquired during the marriage, at the moment of the divorce. Thereby, the German law introduced an absolute novelty.

Finally, during the reform in respect of the Procedural Law, the Family courts within the district courts have been created, in which the procedures regarding family law are concentrated and whose judges, in principle, possess particular proficiency and human capabilities.

In conclusion, it can be stated, that the significant reform of 1977 gave the impulses to many other, partly extensively, reforms in Family Law. Some of the regulations nowadays in force, for example the Act on Registered Life Partnerships (*Lebenspartnerschaftsgesetz*), in no way were foreseeable in the seventies, still far away from being even discussed at that time.

3. The European Regulation no. 2016/1104 on competence, applicable law, recognition and enforcement in matters of property consequences of registered partnerships

(The European Regulation can be read in Italian at http://www.rivistafamilia.it/wp-content/uploads/2016/09/Regolamento-UE-2016.1104-Effetti-patrimoniali-delle-unioni-registrate.pdf)